No. 22694

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEVERLY HILLS NATIONAL BANK, a national banking association,

Appellant,

vs.

COMPANIA DE NAVEGACIONE ALMIRANTE, S. A. PANAMA,

Appellee.

CLOSING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

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CLOSING BRIEF FOR APPELLANT BEVERLY HILLS NATIONAL BANK.

Preliminary Statement.

First: In an effort to sustain a judgment which is contrary to law, Compania's answering brief unfairly suggests that the Bank is attempting to re-argue factual determinations. That assertion is without justification. That this appeal involves solely questions of law is clearly demonstrated by the Bank's statement of the case [*Op. Br.* pp. 6-10[1]]; that statement is based almost entirely upon the findings of the trial court and stipulated facts, and to the limited extent that evidence is referred to, it is that of Compania's

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[1]The "Opening Brief For Appellant Beverly Hills National Bank" is referred to by the abbreviation "*Op. Br.*"; the "Answering Brief of Appellee" is referred to as "*Ans. Br.*".

witnesses and exhibits.[2] Compania has not demonstrated any inaccuracy or insufficiency in the Bank's statement of the case and has accepted the statement in its entirety; to suggest, then, that the Bank is taking issue with findings of fact is particularly misleading.

An illustration of Compania's distortion of the nature of this appeal is found at pages 21-22 of its brief where it discusses the trial court's imposition of a constructive trust. After acknowledging the principle which we set forth in our opening brief that a constructive trust requires a finding of fraud, accident, mistake, undue influence or the violation of an express trust,[3] Compania asserts the Bank may not now reargue the propriety of findings supporting the conclusion that a constructive trust is to be imposed. That argument is entirely misleading for *there are no findings* of fraud, breach of an express trust or any of the other bases for the imposition of a constructive trust, and Compania has pointed to none. Our very point, discussed at length in our opening brief, is that the trial court's conclusions of law cannot be sustained by its findings of fact. For Compania to now suggest that we are rearguing factual determinations, in a case where there was no factual dispute, is misleading and improper.

Second: For the most part, Compania's brief is only an evasion of the main thrust of the arguments we have made. The brief refers to meaningless generalities concerning the preferred status of maritime liens and the

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[2]There was no conflict in the evidence. There were less than one hundred pages of actual testimony. The only witness called by the Bank was Theodore B. Roach who testified briefly on the issue of the stevedoring claim, a matter not involved on this appeal.

[3]See: *Op. Br.* pp. 52-59.

broad powers of a court of admiralty. It ignores, however, the crucial substantive questions involved here which are the nature of Compania's lien, what it can be asserted against, when it must be asserted and what events preclude the imposition of the lien. Take for example the question of the shipowner's (Compania's) possessory lien upon cargo. We contend, supported by Supreme Court decisions [*Op. Br.* pp. 14-23] that the lien is possessory only and does not attach to proceeds. The Supreme Court decisions have not even been mentioned by Compania, but instead the bold assertion is made by Compania that it did not have to retain possession of the cargo and that it had the unilateral "right to substitute securities"[4] by bringing this suit against the Bank. That assertion would vitiate an unbroken line of cases going back more than one hundred years. [E.g. *4885 Bags of Linseed* 66 U.S. 108, 113 (1861); *Cutler v Rae* 48 U.S. 374, 376 (1848)].

Another contention made by us is that to the extent that Compania had any lien of freights or subfreights (*i.e.* monies due Kenray for the shipment of cargo) the lien was valid only to the extent that it was asserted prior to the payment of those monies to Kenray or the Bank; the monies here were prepaid by the consignees and by Purdy and received by the Bank prior to the assertion of any lien by Compania and therefore Compania has no lien thereon. Our contentions in this regard are documented and supported by numerous au-

[4] *Ans. Br.* p. 14. In making this argument Compania continues to rely on *N.H. Shipping Corp. v. Freights of The S.S. Jackie Hause*, 181 F. Supp. 165 (S.D.N.Y. 1960), which as we pointed out in our opening brief involved a *consentual* substitution of non-prepaid freight monies for the cargo. *Jackie Hause*, in fact, expressly affirms the principle that the shipowner's lien is dependent upon possession.

thorities and text writers [*Op. Br.* pp. 34-37]. Compania, without analysis, responds to this contention by imperiously stating that the admiralty texts are wrong and that the cases were directed "solely to the rights and duties of the owner and shipper as against each other". That simply is not so. *In re North Atlantic and Gulf S.S. Co.* 204 F. Supp. 899 (S.D.N.Y. 1962) aff'd *sub nom. Schilling v. A/SD/S Dannebrog* 320 F. 2d 628 (2d Cir. 1963) and to a lesser extent *Schirmer Stev. Co. Ltd. v Seaboard Stev. Corp.* 306 F. 2d 188 (9th Cir. 1962) indicate that had *creditors of the charterer* perfected valid attachments on the freight monies prior to the assertion of the shipowner's lien, the attachments would have priority. [*Op. Br.* pp. 38-39, 45-46]. *A fortiori,* the actual payment of the freights to the creditor has priority.[5]

Compania, while arguing generalities, has completely avoided any analysis of the nature of its claimed shipowner's lien. As we noted in our opening brief [*Op. Br.* p. 38] the theory of the shipowner's lien on unpaid freights is that it is contractually subrogated (under an appropriate lien clause of the charter agreement) to the charterer's rights to receive those unpaid freights; the shipowner is therefore in the same position as a mortgagee who is not in possession. However, once those freights are paid to the charterer of his successor, there no longer is anything to which the owner can

[5]This aspect of the cited cases is discussed at length in our opening brief [*Op. Br.* pp. 38-39, 43-44]. An interesting sidelight of *Schirmer* is that the attorneys for the attaching creditors were the same counsel now representing Compania. Those creditors in *Schirmer* made the same contention we now make, that the shipowner's lien is invalid as to freights or subfreights previously paid to or seized by a creditor of the charterer. [See discussion *Op. Br.* pp. 45-46].

be subrogated, and accordingly the lien falls. Despite the long history of the admiralty, there is no case where the shipowner's lien has been extended to a situation such as that present in the case at bar, that is, to freights which were already paid to the charterer or its successor; and Compania has cited no such case. The judgment below is unsupported by, and indeed contrary to, all existing authority and cannot be sustained.

Third: Although somewhat blurred by Compania's rhetoric, the basic issues here are relatively simply: (1) What is the scope of a shipowner's maritime lien; and (2) Is there legal justification for the imposition of a constructive trust. We have demonstrated conclusively that the maritime lien is limited to a right to retain possession of cargo or the right to receive subfreights[6] which have *not* been prepaid.—That, however, is not what Compania seeks to do here. With respect to the constructive trust argument there are no findings to support such a trust and Compania has not pointed to any evidence which would support such findings even if they were present.

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[6]As we noted in our opening brief [*Op. Br.* p. 25, footnote 15] and acknowledged by Compania [*Ans. Br.* p. 11, footnote 7] the words "subfreight" and "freight" are used interchangeably in the context of this case.

ARGUMENT.

I.

Compania's Possessory Lien Upon Cargo Was Lost Upon Surrender of the Cargo and Does Not Attach to Proceeds.

As noted above, Compania's brief does not question the authorities we previously cited [*Op. Br.* pp. 14-23] holding that a shipowner's lien upon cargo is exclusively possessory in nature and is lost upon surrender of the cargo. Compania argues, however, that by bringing this suit it was entitled to substitute the attached funds for the cargo, even though the funds had previously been paid to the Bank. In making that argument Compania relies entirely on *N. H. Shipping Corp. v. Freights of The Jackie Hause,* 181 F. Supp. 165 (S.D.N.Y. 1960).

We have previously discussed *Jackie Hause* at length [*Op. Br.* pp. 21-23, 41-42,] and will not now repeat that discussion. It is sufficient here to note that *Jackie Hause* involved a crucial fact situation not present in the case at bar. There, the owner and consignee had made a *contractual* substitution of the freight monies (which had not been prepaid) for the cargo *after* the lien on cargo was asserted. The issue was whether such consensual exchange precluded a lien upon the cargo or its substitute and the court held it did not.[7] *Jackie Hause* in no way changed, and in fact recognized, the rule that the shipowner's lien was exclusively possessory. In the case at bar we do not have a con-

[7]It is to be noted that in *Jackie Hause* the owner claimed a direct lien on the freight monies which were still in the hands of the consignee. The substitution therefore did not broaden the rights of the shipowner. Had those moneys been paid to a third person, or attached, however, the shipowner would have no right thereto. [*In re North Atlantic & Gulf S.S. Co., supra*].

sensual substitution. Furthermore, Compania, unlike the owner in *Jackie Hause,* is not seeking to assert a lien upon cargo or its agreed substitute, but is rather seeking to proceed independently against freights prepaid to the Bank.

Compania argues that it was not required to retain possession of the cargo until hire was paid. That argument is contrary to law. If Compania had a lien upon cargo it was *possessory;* the very nature of the possessory lien is that possession must be retained and once possession is relinquished the lien is lost. [See authorities *Op. Br.* pp. 15-17]. Compania did not have, as it suggests at page 14 of its brief, a right to substitute security, and *Jackie Hause* does not so hold. All *Jackie Hause* holds is that a *contractual* substitution of freights which had not been prepaid was not a relinquishment of possession. The "floating warehouse" language in *Jackie Hause* is simply to explain the agreed substitution and does not change the law that the shipowner's lien is possessory. To hold, as Compania argues and the District Court accepted, that the filing of a suit here and attachment of *previously paid* freights was the equivalent of a contractual substitution of *unpaid* freights is to expand beyond recognition the shipowner's possessory lien on cargo.

Compania argues that it could "trace" its lien and cites three decisions which it says supports the power of the trial court to trace. Those decisions are of no substantive value here. *The Surico* 42 F. 2d 935 (W.D. Wash. 1930) and *Bank of British North America v The Freights of Hutton and Ansgar* 137 Fed. 534 (2nd Cir. 1905) have previously been discussed by us. [See *Op. Br.* pp. 39-41]. Neither case involved a shipowner's lien; nor did either case really involve "tracing" since in

neither had funds passed into the hands of a third person not in privity with the agreement at issue. *Lathrop v Freights of the John Ena* 212 Fed. 560 (N.D. Cal. 1914) similarly does not support Compania's tracing theory. The *John Ena* was not a matter on the merits but simply related to an issue of whether the court should confirm an order for the deposit of funds into court pending the litigation. The opinion there refused to confirm the order in view of conflicting claims and simply deferred the matter for trial on the merits. The case therefore has no substantive relationship to the matter at bar. Furthermore, *John Ena* does not involve funds which had been paid to a third person (such as the Bank herein), but involved freights which had been collected by the shipowners. The issue in the case at bar is not the "power" to trace funds, but rather is there any lien which is of a nature that it can be traced. It is to that question that we answer no. Compania has not cited any case where a shipowner's lien was "traced" to the proceeds of cargo or to prepaid freights and cannot do so. The lien on cargo is exclusively possessory and the lien on freights falls as soon as the freights are paid. Therefore, there is no lien to trace and no case has ever attempted to do so.

Compania argues [*Ans. Br.* pp. 8-9] that a shipowner's lien is of first priority. That argument begs the issue here. The owner's lien has priority only to the extent that it is seasonably asserted against property susceptible to the lien—that is, against cargo or against subfreights which have not been prepaid. That is not what Compania seeks to do here. That the shipowner's lien is not of all-inclusive priority is demonstrated by the numerous decisions and texts considering and defining the scope of the owner's lien.

II.

Any Lien That Compania May Have Had Upon Subfreights Was Discharged Upon Payment of the Funds to Respondent Bank Prior to the Assertion of a Lien.

In a somewhat shotgun approach Compania argues that if it does not have a martime lien on the attached funds as "proceeds of cargo" it has one as "freights or subfreights".

First: In response to our preliminary argument that there were no indentifiable freights [See *Op. Br.* pp. 26-31], Compania points to the C.I.F. sales agreements and asserts that since freight was included in the price paid to Kenray, the trial court was justified in making the determination that there was freight of $96,-750.00 [*Ans. Br.* pp. 11-12]. We are unable to follow Compania's logic since if (as is undisputed) it is the *seller's* obligation to pay the freight in a C.I.F. contract, there would be nothing payable by the consignees and hence no identifiable freights.[8]

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[8]Compania also critcizes us for not inquiring of its witness concerning the subject of identifiable freights. [*Ans. Br.* pp. 11-12]. In this connection we note the following testimony found at page 47 of the Reporter's Transcript:

"BY MR. GOLDBERG:

"Q Mr. Coughlin, you told me that in negotiating the sale of the goods from Kenray to the consignees, that is, the goods that were shipped on the SEARAVEN, that sale was made CIF, cargo insurance, and freight.

"A. Yes.

"Q That sale was made upon a lump sum basis to the consignees?

"A. Yes.

"Q That is, the consignees paid a lump sum for the total cost of the goods.

"A Yes.

"Q Was there any allocation in that lump sum as between those three items?

"A No."

Second: In our opening brief we also argued that the subject charter party does not grant Compania a lien on freights [*Op. Br.* pp. 31-34]. In so doing we called the court's attention not only to the authority supporting our position, but also to the statements made in *N. H. Shipping Corp. v Freights of The Jackie Hause, supra,* 181 F. Supp. at 170 that a lien on cargo is a lien on freights and demonstrated why that statement was not controlling. [See: Op. Br. pp. 33-34]. Compania's response is to rely on *Jackie Hause.* Therefore, that issue requires no further discussion here.

Third: The crucial question here is whether Compania's asserted lien survives prepayment of the freights (*i.e.* payment to the Bank before Compania's lien was asserted) even assuming that such lien originally existed under the charter agreement and that there were identifiable freights. At pages 34-47 of our opening brief we demonstrate conclusively that the lien does not so survive and cite numerous authorities supporting the proposition that the owner's lien does not reach prepaid freights. Compania makes no answer to those authorities and cites no case where a shipowner was allowed to reach prepaid freights. The suggestion made by Compania [*Ans. Br.* pp. 16-17] that the rule only protects consignees against double payment is not correct. As we have already noted, both *In re North Atlantic & Gulf Steamship Co.,* 204 F. Supp. 899, 904 (S.D.N.Y. 1962) aff'd *sub nom Schilling v A/SD/S Dannebrog,* 320 F. 2d 628 (2nd Cir. 1963) and to some extent *Schirmer Stev. Co. Ltd. v. Seaboard Stev. Corp.,* 306 F. 2d 188 (9th Cir. 1962) discuss the principle in the context of a shipowner versus a creditor of the charterer. Once the freights are paid, the lien

falls and there is no lien to assert [See, *Op. Br.* pp. 36-47].

Compania attempts [*Ans. Br.* p. 17] to dispose of the recognized text writers who support the Bank's position by cavalierly stating they are wrong and contrary to authority.[9] However, Compania has cited *no case* where a shipowner was allowed to assert a lien against prepaid freights regardless of the alignment of the parties or who had possession of the funds. The cases cited at page 9 of Compania's brief, with the exception of *The Solhaug* 2 F. Supp. 294 (S.D.N.Y. 1931) are discussed in our opening brief. [Op. Br. pp. 35, 38, 41-44]. None of them involved prepaid freights. *Solhaug* is consistent with the Bank's position. There, a shipowner sought to impose a lien on the unpaid portion of subfreights still held by a consignee of a sugar shipment; the issues were whether the *consignee* was entitled to credit for certain advances made by it and for certain sums paid to the charterer and whether those sums were paid prior to the consignee's notice of the shipowner's claim. *Solhaug* did not involve, as here, a shipowner's claim of lien upon freights previously paid to and in the possession of a third party.

The citation of Gilmore & Black *The Law of Admiralty,* p. 517, note 103 at page 9 of the answering brief supports the Bank. There the authors, in discussing *American Steel Barge Co. v Chesapeake & Ohio Coal Agency* 115 F. 669 (1st Cir. 1902) and other cases, note

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[9]It is to be noted that Compania takes issue with *Poor on Charter Parties* and *Stephens on Freights.* Its brief is silent, however, with respect to our citation of Gilmore & Black *The Law of Admiralty* which is a text cited by Compania for other purposes. Gilmore & Black are in complete accord with Stephens and Poor. [See quotation, *Op. Br.* p. 36]. Compania itself cites Poor as a recognized authority. [*Ans. Br.* p. 14, footnote 9].

that a shipowner has no lien on freight without a specific clause in the charter party [See *Op. Br.* pp. 31-34] and that if there is such a clause the shipowner may enforce the lien "against any freight remaining *unpaid*". (Emphasis ours). [See *Op. Br.* pp. 34-39].

Compania refers to the Bank as being in the "shoes of Kenray". That is of course not true. The Bank as a creditor of Kenray is no more in its shoes than is Compania which was also a creditor. Furthermore, even if the assertion were correct, it would add nothing to the analysis here since the lien is lost as to prepaid freights even if paid to the charterer. [See authorities *Op. Br.* pp. 35-36]. The "third person" referred to at page 16 of Compania's brief must be the consignee or shipper, and if the subfreights have left the hands of the consignee or shipper and been paid to the charterer or his successor, the owner has no lien thereon. Compania would have no lien upon the prepaid freights even if they still remained in the hands of Kenray and had not been paid to the Bank. The fact that Compania exercised a provisional remedy and caused the funds to be attached does not mean that it has any substantive right thereto.

It is the Bank's position that Compania's lien does not reach prepaid freights, that is, the monies received by the Bank prior to the assertion of any claim by Compania. The correctness of this position is demonstrated by a comparison of *Jackie Hause, supra,* relied

upon by Compania with *In re North Atlantic & Gulf S.S. Co., supra,* which we cited in our opening brief. In *Jackie Hause* the court characterized the issue as follows:

> "We have to determine the ownership of *uncollected freights* admittedly due on a transocean cargo of corn . . ." [181 F. Supp. at 167]. (Emphasis ours.)

In the case at bar we are not dealing with *uncollected* freights, but rather with freights *prepaid* prior to the assertion of any lien. Compania's claim in the instant matter is therefore governed by the following rule articulated *In re North Atlantic & Gulf S.S. Co., supra,* 204 F. Supp. at 904 as follows:

> "The shipowner's lien on subfreights permits him to obtain payment of monies due under the charter out of such subfreights earned by the vessel as remain *unpaid* by a shipper to the charterer (authority) . . . If the cargo is delivered and the shipper pays the subfreights to the charterer in good faith, *the shipowner's lien falls* (authority)." (Emphasis ours.)

And in *Stephens on Freight,* p. 200:

> "But such a lien can only be exercised before the subfreight has been paid to the charterer of the ship or his agent. The *lien confers no right on the shipowner to follow the subfreight after it has been paid.*" (Emphasis ours.)

In conclusion, then, the judgment cannot be sustained on the theory that the attached monies are subfreights or freights upon which Compania has a lien.

III.

The District Court Had No Jurisdiction or Substantive Basis for the Imposition of a Constructive Trust.

A. The District Court Sitting in Admiralty Had No Jurisdiction to Consider an Independent Equitable Claim.

In response to our argument [*Op. Br.* pp. 48-52] that the District Court improperly exercised jurisdiction over an independent equitable claim, Compania cites, at page 7 of its brief, authorities dealing with quasi-contractual claims.[10] Those cases have no application here. They did not involve asserted trusts but rather were situations where there had been overpayment of charter hire [*Sword Line Inc. v United States* 228 F. 2d 344 (2nd Cir. 1955) aff'd. 230 F. 2d 75, aff'd. 351 U.S. 976 (1956)], failure of consideration in a contract of passage [*Archawski v Hanioti* 350 U.S. 532 (1956)], excessive freight charges [*Krauss Bros. Lumber Co. v Dimon S.S. Corp.* 290 U.S. 117 (1933)] and a seamen's claim for maintenance and cure (disability coverage) against the owner of his ship. [*Vaughan v Atkinson* 369 U.S. 527 (1962)].

International Refugee Organization v Maryland Drydock Co. 179 F. 2d 284 (4th Cir. 1950), also cited by Compania, was an attempt by parties advancing monies to an owner of a ship to impose a constructive trust upon the vessel so as to maintain priority over the lien of one making repairs to that vessel. The court de-

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[10]Compania suggests in a footnote [*Ans. Br.* p. 5] that the jurisdictional argument is moot because the trial court could have exercised diversity jurisdiction had it been asked to do so. The answer to this contention is simply that the court was *not* asked to do so. The objection to jurisdiction was made well in advance of trial. [See, Pretrial Order p. 9, R. 181].

clined to impose such a trust. *Van Camp Sea Food Co. v Di Leva* 171 F. 2d 454 (9th Cir. 1948) referred to by Compania had nothing to do with constructive trusts and in fact supports the Bank's position here. In that case, which was a libel for loss of earnings due to a collision, this court recognized the distinction between an admiralty court's proceeding on equitable principles and exercising jurisdiction over an independent equitable claim. In *Gayner v The New Orleans,* 54 F. Supp. 25 (N.D. Cal. 1944) the issue was whether discharged ferryboat employees could impose a lien upon a vessel for termination benefits; the case has no relationship to the jurisdictional issue present here. Similarly *Compania Anoima Venezolana De Navegacion v A. J. Perez Export Co.* 303 F. 2d 692 (5th Cir. 1962) has no application here despite what Compania refers to as a "colorful opinion". The issue in *Perez* was not one of jurisdiction but simply whether a berth agent, as the subrogee of a carrier, was entitled to collect freight charges from a shipper where the shipper had previously paid a freight forwarder who in turn failed to pay the carrier or the agent.

1 Benedict, *Admiralty* §71 (6th Ed. 1940) cited by Compania, recognizes that "the court of admiralty is not a court of general equity nor has it the characteristic powers of a court of equity. Admiralty does not take cognizance of specific performance or of trusts . . .".

Compania's attempted distinction of the *Bay Belle* case[11] (in which it was expressly held that admiralty

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[11]*Port Welcome Cruises, Inc. v S.S. Bay Belle* 215 F. Supp. 72, 84-85 (D.C. Md. 1963), aff'd *sub nom Humble Oil & Refining Co. v S.S. Bay Belle* 324 F. 2d 954 (4th Cir. 1963).

had no jurisdiction to impose a constructive trust) is most unique and involves a classic bootstrap approach. Compania argues in *Bay Belle* the *res* was not before the court whereas in the case at bar the *res* was before the court below [*Ans. Br.* p. 8]. What Compania ignores is that the *res* here was before the court only because the District Court chose to exercise jurisdiction over it, in direct contravention of the historical limitations of its admiralty jurisdiction, whereas in *Bay Belle* there was no *res* before the court because the trial judge properly concluded that he could not exercise jurisdiction. The attempted distinction, therefore, is merely a restatement of the result reached by the trial court.

In short, Compania has cited no case, and there are none, where an admiralty court has impressed a constructive trust. The exercise of jurisdiction cannot be sustained.

B. There Is No Substantive Basis For the Imposition of a Constructive Trust.

As noted in our Preliminary Statement, *supra,* Compania attempts to make it appear that we are re-arguing findings of fact supporting the imposition of a constructive trust. Such is not the case. What we are arguing is that there are no findings which justify the imposition of a trust [*Op. Br.* pp. 52-59].

Compania argues [*Ans. Br.* p. 22] that the constructive trust can be supported on three bases: constructive fraud, a breach of a confidential relationship between Kenray and the Bank, and unjust enrichment. These assertions dissolve upon analysis.

First, there was no finding of constructive fraud by the trial court and Compania has not pointed to any finding or evidence of the same. [See *Op. Br.* p. 54]. Compania has cited no authority to support its bold assertion that the Bank's conduct here constitutes constructive fraud,[12] nor has it pointed to any evidence which supports a finding of such fraud even if such finding had been made.

Second, there is no finding by the trial court of a confidential relationship between Kenray and the Bank and there could be none since their relationship was that of a creditor and debtor. [See *Op. Br.* p. 58]. Furthermore, even if there were such a relationship between *Kenray* and the Bank, that could not create any right in Compania with which the Bank had no contact. Again, no authority is cited to support the assertion that a confidential relationship exists, and Compania has not pointed to any finding or evidence of the same.

Third, the Bank gave legal value and was not unjustly enriched; there is no finding of unjust enrichment and Compania has not and cannot show how or in what manner the Bank has been unjustly enriched. [See discussion *Op. Br.* pp. 54-55]. The funds received by the Bank were applied upon a bona fide debt of Kenray. If Kenray's debt to the Bank was not value, then similarly its debt to Compania was not value. Furthermore, even if the Bank were unjustly enriched, it is only Kenray (which paid the Bank) and not Compania that

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[12]Compania cites *Scott on Trusts* and other authorities for generalized statements as to when a constructive trust may arise (*i.e.* fraud, undue influence, breach of an express trust or confidential relationship, etc.). Those citations add nothing to the analysis of whether a legal predicate for the imposition of a constructive trust is present here.

may be heard to complain. The case of *Northwest Marine Works v United States* 307 F. 2d 537 (9th Cir. 1962) cited by Compania in its conclusion has no factual similarity to the case at bar nor does it have any relationship to the legal issues present here. That case simply held that existing maritime liens (for materials and supplies) had priority over a claim of the United States Maritime Administration (as mortgagee) for advances made while the vessel was operating under an informal receivership which was ultimately held to be improper.

As we clearly demonstrated in our opening brief the record here is devoid of any legal basis or justification for the impression of a constructive trust. This is not a bankruptcy case. The preference of one creditor cannot create a trust in favor of another. Compania has pointed to no evidence or findings which support the District Court's conclusions sustaining an equitable cause of action in its favor.

IV.

Compania Is Barred by Principles of Waiver and Estoppel.

In response to our argument that its issuance of "freight prepaid" bills of lading and its other conduct estops Compania from asserting any lien [*Op. Br.* pp. 60-65] Compania asserts that the Bank "gave no consideration" for the bills of lading and drafts. In making this argument Compania assumes that Kenray's debt arising from the prior extension of credit is not value. That assumption is not supported by any citation of authority and in fact is directly contrary to law.[13]

[13]See authorities, *Op. Br.* pp. 54-55 holding that an antecedent indebtedness constitutes value.

Furthermore, if the Bank's antecedent debt was not value, then Compania also gave no value for it too extended credit to Kenray by deferring the time for payment of the charter-hire and now seeks to impress a lien for the collection of an antecedent debt.

Conclusion.

An affirmance of the judgment here would create new rights where none existed previously; it would overrule an unbroken line of authority; and it would expand the scope of a shipowner's remedies beyond that ever recognized by a court of admiralty. The ingenuity of Compania's counsel cannot circumvent contrary authority or create legal rights where none exist. Accordingly the judgment should be reversed with directions to the District Court to enter judgment in favor of Beverly Hills National Bank.

Respectfully submitted,

JEROME L. GOLDBERG
Attorney for Appellant.

LOEB AND LOEB
Of Counsel.

Certificate.

I certify that in connection with the preparation of this brief I have examined the Federal Rules of Appellate Procedure and the Rules of The United States Court of Appeals For The Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROME L. GOLDBERG,